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No.

IN THE

Supreme Court of the United States

October Term, 1981

HARVEY M. LEVIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a court of appeals have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), as to an appeal from a district court order denying a criminal defendant's application to enter a plea of *nolo contendere*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Harvey M. Levin respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 8, 1982.

OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit filed April 8, 1982 which dismissed the appeal to that court from the United States District Court for the Eastern District of Pennsylvania is unpublished. The order is set forth in the attached Appendix at page A1. The order of the United States Court of Appeals denying Petitioner's application for rehearing and suggestion of rehearing *en banc* which was filed on April 16, 1982 was denied on May 5, 1982 and is unpublished. The text of this order is set forth in Appendix B at A2. In neither instance did the court of appeals file an opinion.

The opinion of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's application for leave to enter a plea of *nolo contendere* is unreported. It is set forth in Appendix C at page A3.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was dated and entered on April 8, 1982. A timely petition for rehearing and suggestion of rehearing *en banc* was filed on April 16, 1982 and was denied on May 5, 1982. This Court has jurisdiction to review the final judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) in that Petitioner was a party to a criminal case in the lower court.

STATUTORY PROVISION INVOLVED

Title 28 United States Code § 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

On July 9, 1981 a United States Grand Jury sitting in the Eastern District of Pennsylvania returned a nineteen count indictment against the Petitioner for mail fraud, 18 U.S.C. § 1341 (counts 1-11) and false statements, 18 U.S.C. § 1001 (counts 12-19). Count one of this indictment forms the factual predicate for the entirety of the indictment in that the first eighteen paragraphs of count one are incorporated by reference into all of the succeeding counts.

The indictment charges, in substance, that Petitioner, a licensed medical doctor, acted as a physician-investigator for various drug manufacturers and drug sponsors in connection with certain proposed new drugs. The Petitioner was to conduct studies concerning the efficacy and, according to the prosecution, the safety of various new drugs as compared with known drugs and a placebo. The indictment then charges, in paragraph seventeen of the first count, that Petitioner devised a scheme to defraud the various drug companies and his medical copractitioners in a professional corporation by representing that he had successfully completed eight investigational drug studies when he knew that the studies were not completed as represented. This paragraph also charges that he attempted to conceal the allegedly fraudulent nature of these drug studies after they had been completed and that he converted to his own use funds which should have been paid to the professional association of which he was a shareholder and employee. Counts one through eleven conclude by alleging that there were eleven separate mailings in furtherance of this scheme to defraud in violation of 18 U.S.C. § 1341.

Counts twelve through nineteen of the indictment charge Petitioner with knowingly and willfully making false statements in connection with a matter within the jurisdiction of the Food and Drug Administration (FDA),

an agency of the United States, by preparing false case report forms in relation to these same drug studies which were submitted to the drug companies or drug sponsors and by them submitted to the FDA, all in violation of 18 U.S.C. § 1001.

On November 9, 1981 Petitioner and his counsel appeared before the Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania and requested the court's permission to change the previously entered plea of not guilty to a plea of *nolo contendere* to the entire bill of indictment. Through counsel, Petitioner set forth the factual background of the indictment and his reasons for desiring to enter the discretionary plea of *nolo contendere*. The district court expressed concern over two problems. First, the court expressed concern regarding the acceptance of a plea of *nolo contendere* absent an admission by Petitioner that he was guilty. Secondly, the court expressed concern over the potential civil consequences which would flow from a plea of *nolo contendere*.

The prosecution opposed the entry of the plea of *nolo contendere*. With regard to the potential civil consequences of such a plea, the only issue concerned the collateral effect of the plea in a medical licensure revocation proceeding. The exact collateral effect of the plea of *nolo contendere* on the anticipated licensure proceedings was in doubt and, accordingly, the court requested memoranda from the parties regarding this matter.

Following such submission, the court held a second hearing on November 12, 1981. At the conclusion of this hearing, the court was satisfied that the civil consequences of the proposed plea of *nolo contendere* were not such as to require it to reject the plea; nevertheless, the plea was rejected for the reason that the court viewed the plea as similar to one which the defendant had entered in *North*

Carolina v. Alford, 400 U.S. 25 (1970). That is, the court viewed as incompatible with the proposed plea, counsel's statements regarding Petitioner's lack of culpability and the proposed plea of *nolo contendere*. The court below therefore exercised its discretion and refused to accept the plea.

In a memorandum and order dated November 12, 1981 the court further explained its reasons for refusing to accept the plea of *nolo contendere*.[1] On November 16, 1981 Petitioner filed a notice of appeal from the order of November 12, 1981 denying his request to enter a plea of *nolo contendere*.

Petitioner timely filed his brief in the United States Court of Appeals for the Third Circuit and, in the first argument section thereof, urged that the district court order denying leave to enter a plea of *nolo contendere* was a "final decision" within the meaning of 28 U.S.C. § 1291. Petitioner's brief urged the court below to address the important issue of those factors which a district court should consider in the exercise of its discretion regarding pleas of *nolo contendere*, a subject which has received almost no appellate elucidation.

The prosecution filed a brief on behalf of the United States urging that there was no appellate jurisdiction to review the lower court's order prior to final judgment. At the same time the United States filed a motion to dismiss the appeal for want of jurisdiction.

On April 8, 1982 a panel of the United States Court of Appeals for the Third Circuit consisting of Circuit Judges Gibbons, Sloviter and Becker granted the government's motion and dismissed the appeal. On April 16, 1982 Petitioner filed a petition for rehearing and suggestion of rehearing *en banc*, which petition was denied on May 5, 1982. This petition for certiorari followed.

1. The memorandum and order are reproduced in Appendix C attached hereto, p. A3.

REASONS FOR GRANTING THE WRIT

An appeal from a pretrial court order refusing to accept a proffered plea of *nolo contendere* fits squarely within the criteria announced by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The order in issue conclusively determined the disputed question, resolved an important issue which was completely separate from the merits of the underlying action, and is effectively unreviewable on direct appeal from a final judgment.

The Court of Appeals for the Third Circuit, in a recent decision unrelated to the instant case, appears to have constructed a rule for collateral order appeals in criminal cases which is inconsistent with the decisions of other courts of appeals. In *United States v. Levine*, 658 F.2d 113 (3d Cir. 1981), the court ruled that a collateral order appeal in a criminal case will only lie if an issue of constitutional dimension is involved. Other courts of appeals have entertained prejudgment appeals in criminal cases involving no constitutional question under the *Cohen* rule. This Court should grant certiorari in order to resolve the important disagreement among the various courts of appeals and to articulate the reach of *Cohen* in criminal cases.

1. Under the Facts of This Case, the Lower Court Order Denying Petitioner's Request to Enter a Plea of *nolo contendere* to the Bill of Indictment Was a "Final Decision" Within the Meaning of 28 U.S.C. § 1291 and Was a Collateral Order Within the Meaning of This Court's Decision in *Cohen*, and Was Therefore Immediately Appealable as of Right.

Title 28 U.S.C. § 1291 vests courts of appeals with jurisdiction to hear appeals from final decisions of district courts. Normally, in a criminal case the final decision is the judgment of sentence. However, this Court has established an exception to this rule known as the collateral order doctrine and has permitted appeals, under certain limited circumstances, from final decisions other than final judgments. In *Cohen*, 337 U.S. 541, 546, the Court emphasized that 28 U.S.C. § 1291 must be given a "practical rather than a technical construction." The order appealed from in this case is within the collateral order doctrine articulated in *Cohen* and the lower court therefore erred in dismissing the appeal.

In *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), this Court summarized the three-part *Cohen* test for immediate appealability. For an otherwise interlocutory order to qualify as a "final decision" for purposes of 28 U.S.C. § 1291, the order must ". . . conclusively determine the disputed question, resolve an important issue completely separate from the merits, and be effectively unreviewable on appeal from a final judgment." The order in question in this case meets all of these requirements.

In a written order entered November 13, 1981 the district court rejected Petitioner's attempt to plead *nolo contendere* for the reason that, through counsel, he refused to admit his guilt to the charges contained in the indictment. The lower court held that it would not accept any plea other than a not guilty plea unless Petitioner was willing to admit his guilt personally, notwithstanding that a

factual basis for the plea—if the law requires a factual basis for a *nolo contendere* plea [2]—could be established through other legally sufficient means. This order is in all senses a final resolution of this narrow issue. If the lower court's decision is not reviewed prior to trial, then the case will proceed to trial upon the Petitioner's plea of not guilty. As to this issue concerning the rejection of the plea of *nolo contendere*, there is no further action which will be taken by the trial court.

The issue in this case is far different from the issues in other cases where appellate courts have refused to find appellate jurisdiction. In *Coopers and Lybrand, supra*, for example, this Court held that an order denying class action certification was not the type of collateral order contemplated by *Cohen* because Rule 23(c)(1) of the Federal Rules of Civil Procedure specifically provides that such an order is subject to revision.[3]

Additionally, nothing which may occur in the trial court subsequent to its rejection of the proffered *nolo contendere* plea will properly bear upon either the pro-

2. Rule 11(f) of the Federal Rules of Criminal Procedure requires a court, before entering judgment upon a guilty plea, to satisfy itself that there is a factual basis for the plea. But by its own terms, Rule 11(f) applies only to pleas of guilty and not to pleas of *nolo contendere*. Indeed, such a requirement is antithetical to the very sense of a plea of *nolo contendere* in that such a plea does not admit the truth of the charges, and hence is not admissible in a subsequent proceeding. It is merely a statement that the criminal defendant "will not contest" the charges. Black's Law Dictionary 945 (5th ed. 1979); *Teslovich v. Fireman's Fund Ins. Co.*, 110 Pa. Super. 245, 168 A. 354 (1933). *See generally* Lenvin and Myers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L. J. 1255, 1256 (1942).

3. *But cf. In Re: G. M. C. Engine Interchange Litigation*, 594 F.2d 1106, 1118, *cert. denied*, 444 U.S. 870 (1979), where the seventh circuit held that an order approving a partial class action settlement was final and appealable even though the lower court theoretically could have modified the order.

priety of the lower court's exercise of discretion or an appellate court's review of that discretion. Stated another way, the correctness of the lower court's exercise of discretion will be based upon the record as made at the time of its exercise of discretion. *United States v. Navedo*, 516 F.2d 293, 297 (2d Cir. 1975). Thus, the order and the record as it now stands are, for purposes of the issue being appealed, not subject to further development.

The second prong of the *Cohen* test is also satisfied in this appeal. The issue upon which appellate review is sought will resolve an important issue which is completely separate from the merits of the underlying action.

The underlying case involves the grand jury's allegations that Petitioner, on eleven separate occasions, used the mails in furtherance of a scheme to defraud various sponsors of proposed new drugs and on eight occasions made false, material statements in a matter within the jurisdiction of a federal agency, the FDA. The issue at trial will be whether the prosecution can prove Petitioner's guilt beyond a reasonable doubt. The substantive issue in this appeal, which concerns whether the lower court abused its discretion in refusing to accept a plea of *nolo contendere* for the stated reason, is completely separate from the merits of the upcoming trial.

This case is therefore unlike cases such as *United States v. Levine*, 658 F.2d 113 (3d Cir. 1981), wherein the court dismissed an appeal from an order denying a motion to dismiss an indictment based upon a statute of limitations defense. Although the prosecution in that case had conceded that the second prong of the *Cohen* test was met, the third circuit correctly noted that in the garden variety statute of limitations case, the limitations period is "not always neatly severable from the merits of the case." 658 F.2d at 122. Continuing crimes such as embezzlement, conspiracy and similar offenses may require

the receipt of trial evidence to determine whether any criminal act occurred within the applicable limitations period.

Such potential interaction between the trial evidence and the legal issue upon which intermediate appellate review is sought cannot occur in this case. As the second circuit cogently noted in *Navedo*:

> Whatever may have been established by the evidence at trial and whatever inferences such evidence may support as a matter of hindsight, our inquiry on this appeal in determining whether the trial judge abused his discretion must focus upon what was before the judge *at the time he was asked to accept Navedo's guilty plea.* Fed. R. Crim. P. 11; . . . [citations omitted].

United States v. Navedo, 516 F.2d at 297 (emphasis in original).

It is thus clear that, regardless of what happens at any subsequent trial of this case, the issue concerning whether Judge Fullam abused his discretion in refusing to accept the *nolo contendere* plea will be judged upon the basis of the record as it now stands. Further litigation will not assist an appellate court in properly resolving the issue, nor will it cause the lower court to change its decision.

The final *Cohen* factor concerns whether, if intermediate appellate review is denied, an important right will probably be irreparably lost. Under the facts of this case, it is clear that, absent appellate review of the proposed *nolo contendere* plea at this juncture, the benefits intended to be afforded by such a plea will be forever lost.

In support of Petitioner's request to the lower court to accept the *nolo contendere* plea, counsel set forth several factors which warranted the acceptance of such a

plea. First, counsel noted that if this plea were not accepted then Methodist Hospital, one of the primary health care centers of Philadelphia, would be forced to endure many weeks of unfavorable publicity in that the investigational drug studies which the Petitioner is charged with fabricating supposedly occurred at that institution. Further, many innocent patients of both Petitioner and other doctors with staff privileges at Methodist Hospital will be severely inconvenienced by being required to attend court and provide their testimony and will be embarrassed by having to testify concerning a subject which is intensely private: the subject of childbirth.

If the court of appeals is not permitted to intercede at this procedural juncture and decide the issue of whether the lower court abused its discretion in refusing to accept the tendered plea of *nolo contendere*, then the benefits to Methodist Hospital and its physicians and patients will be lost, even if it is later determined that the lower court acted improperly in refusing to accept the plea of *nolo contendere*.[4]

This Court recently dealt with this third prong of the *Cohen* test in *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368 (1981). In *Firestone*, the district court entered an order denying defendant's motion to disqualify plaintiff's counsel. In holding that this order was not

4. In *Stack v. Boyle*, 342 U.S. 1 (1951), the Court, *in dictum*, said that an order setting unreasonable bail could be immediately appealed pursuant to the *Cohen* doctrine. (This procedure is no longer necessary in light of the Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3152.) The courts of appeals have considered post-conviction appeals raising bail issues, *United States v. Cooper*, 523 F. 2d 8, 10 (6th Cir. 1975), *United States v. Hodgdon*, 365 F. 2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967), but the right to bail, like the ability to plead *nolo contendere*, must be granted immediately, not after trial and conviction, in order to be fully effectuated.

immediately appealable, and thus resolving a serious dispute among the various courts of appeals, this Court focused upon the extent to which this order would be effectively unreviewable on appeal from the final judgment. The defendant in *Firestone* could offer nothing short of sheer speculation concerning the distinction between the order denying disqualification and any other interlocutory order entered in the normal run of civil litigation. But although review was denied, the Court noted that the issue was subject to reconsideration in the district court should additional facts appear of record and further noted the possibility, in the unusual case, of the certification procedure available under 28 U.S.C. § 1292(b). 449 U.S. at 378, n. 13.

This case is unlike *Firestone* for several reasons. First, the district court's rejection of the *nolo* plea will mean, if left undisturbed, that the benefits to the Petitioner and his profession will be unavailable. The rejection of the plea will mean a trial, the exact result sought to be avoided by the entry of the plea. Further, unlike the civil litigants in *Firestone,* Petitioner is involved in a criminal proceeding to which 28 U.S.C. § 1292(b) has no application. Thus, if immediate review is not obtained, there will, as a practical matter, be no review whatsoever.

This Court's most recent decision concerning the proper application of the third prong of the *Cohen* test is *United States v. Hollywood Motor Car Co.*, 50 U.S.L.W. 3998.15 (U.S. June 28, 1982). In a *per curiam* decision, this Court reversed a decision of the ninth circuit which had accepted § 1291 jurisdiction of an appeal from a pretrial order denying a motion to dismiss a criminal indictment based upon a vindictive prosecution claim. Impliedly ruling that the trial court order conclusively determined the disputed question and resolved an important issue separate from the merits of the action, the Court held:

> The right asserted by respondents is simply not one that must be upheld prior to trial if it is to be enjoyed at all.

50 U.S.L.W. at 3998.16.

In reaching this conclusion, this Court examined a defendant's right to be free from vindictive prosecution and concluded that such right was not a right to be free from any retrial whatsoever. This case is wholly unlike *Hollywood;* the exact right asserted by Petitioner, pursuant to Rule 11, was the right to enter a plea of *nolo contendere* and therefore not to be subjected to any trial at all. Unlike *Hollywood*, therefore, Petitioner's rights will be forever lost if immediate appellate jurisdiction is unavailable.

The decision of the court of appeals below which dismissed Petitioner's appeal from the order denying his application to enter a plea of *nolo contendere* to the bill of indictment is contrary to this Court's decision in *Cohen* and its progeny, and this Court should therefore grant certiorari and reverse the order of the court of appeals.

2. The Decision of the Court of Appeals Is in Conflict With the Decision of Other Courts of Appeals in That the Lower Court Appears to Have Applied a Criterion Rejected by Other Circuits.

The decision of the lower court concerning which review is now sought was simply that Petitioner's interlocutory appeal was dismissed upon motion of the United States claiming a lack of jurisdiction. No opinion in support of this order was filed. It appears that this decision may well have been based upon an earlier decision of the court of appeals which created a requirement for collateral order appeals in criminal cases which has not been required by other circuit courts.

In *United States v. Levine*, 658 F.2d 113 (3d Cir. 1981), Judge Adams appeared to create a requirement, in connection with the third prong of the *Cohen* test, that the substantive issue upon which appellate review was sought involve a specific constitutional guarantee. 658 F.2d at 124-129. The District of Columbia circuit appears to have taken a similar position. *United States v. Brizendine*, 659 F.2d 215 (D.C. Cir. 1981). *Levine* rejected jurisdiction to entertain an interlocutory appeal from an order denying a motion to dismiss based upon a claimed violation of a statute of limitations. *Brizendine* denied interlocutory review of a trial court order denying a motion to dismiss based upon claimed error in the plea bargaining process which amounted to vindictive prosecution.

In contrast, the United States Court of Appeals for the Ninth Circuit has recognized interlocutory appellate jurisdiction pursuant to § 1291 in the selective prosecution context, *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981). In *United States v. Alessi*, 536 F.2d 978 (2d Cir. 1976), *criticized in United States v. Alessi*, 544 F.2d 1139 (2nd Cir.), *cert. denied*, 429 U.S. 960 (1976), the court of appeals accepted interlocutory appellate jurisdiction where the issue involved was whether a previous plea bargain precluded a subsequent indictment.[5] And in *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3669 (U.S. Feb. 22, 1982) (Nos. 81-972, 81-1159, 81-1353), the sixth circuit entertained an appeal from a lower court order disqualifying counsel for the prosecution in a criminal case.

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5. The tenth circuit rejected the *Alessi* decision in *United States v. Eggert*, 624 F.2d 973 (10th Cir. 1980). This division of authority was noted by Mr. Justice White in his dissent from the denial of certiorari in *Central Liquor Co. v. United States*, 449 U.S. 1022 (1980), *denying cert. to* 628 F.2d 1264 (10th Cir.).

This court has entertained interlocutory appellate jurisdiction in criminal cases on only three occasions: *Stack v. Boyle*, 342 U.S. 1 (1951) (appeal from denial of motion to reduce excessive bail); *Abney v. United States*, 431 U.S. 651 (1977) (appeal from denial of motion to dismiss indictment on double jeopardy grounds); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (appeal from denial of motion to dismiss prosecution alleging violation of Speech or Debate Clause). Although the substantive issues in each of these cases involved a specific constitutional guarantee, these decisions do not stand for the proposition that the collateral order doctrine so requires.

Finally, and most importantly, this Court's most recent application of the *Cohen* doctrine in the criminal appeals context does not create or endorse the "specific constitutional guarantee" requirement constructed by the third circuit in *Levine, supra*, and apparently applied in this case. In *United States v. Hollywood Motor Car Co., supra*, this Court held that a vindictive prosecution claim was not the type of claim which would be irrevocably lost absent immediate review. As opposed to the creation of a mechanical rule regarding the constitutional nature of the claim, this Court applied a functional analysis of the nature of the underlying right. Thus, although Petitioner's claim is not of constitutional dimension, it is a claim which, if valid, must be granted before a trial on the underlying indictment in order to have effect. Although *Hollywood* resolves the split of authority in the circuits regarding the immediate appealability of vindictive prosecution claims, 50 U.S.L.W. 3998.15 n.1, it does not resolve the underlying doctrinal division.

There is therefore substantial disagreement among the lower federal courts concerning the proper scope and application of the *Cohen* collateral order doctrine in the

context of criminal cases. The instant case is appropriate for review on certiorari in order to resolve the division of authority in the lower federal courts.

CONCLUSION

The Petitioner requests this Court to issue a writ of certiorari and thereby to review the judgment of the United States Court of Appeals for the Third Circuit which dismissed Petitioner's appeal.

Respectfully submitted,

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